**Ole Keiwua v Chief Justice of Kenya and others**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 5 August 2005

**Case Number:** 202/05

**Before:** Githinji JA

**Sourced by:** LawAfrica

*[1] Judicial review – Right of appeal – Whether a right of appeal existed against directional and*

*procedural orders of court – Section 8(5) – Judicature Act (Chapter 8).*

**JUDGMENT**

**Githinji JA:** On 14 July 2005, the applicant filed a notice of motion, of the same date, under a

certificate of urgency pursuant to rule 47(1) of the Court of Appeal Rules. The certificate of urgency was

placed before me and on 15 July 2005 I declined to certify the notice of motion urgent for two reasons

thus:

“1. The application has not been made promptly. The notice of motion was filed on 14 July 2005 a month

after the orders and a week before the scheduled hearing of the judicial review application.

2. M ore importantly, the orders applicant, intends to appeal against are merely directional given after an

oral request for directions.

The orders have not determined any matter raised in the judicial review application. They are not appellable as of right. Leave to appeal has not been obtained.” The certificate of urgency has now been heard *inter partes* for three hours on the informal application of the applicant, under rules 47(5) of the Court of Appeal Rules. It is strenuously opposed by both counsel for respective respondents. Mr *Obwayo*, for the first six respondents, in particular, contends that the notice of motion is frivolous and an abuse of the process of the court as the superior court did not make any justifiable order, which can be appealed against. There is a pending judicial review application in the superior court viz. High Court miscellaneous application number 1298 of 2004 in which the applicant seeks orders of *certiorari*, *mandamus*, prohibition relating to matter number 2 of 2004 of the Tribunal to investigate the judges of appeal published under Gazette Notice number 95 of 6 January 2004 and laid before the Tribunal under section 62(5) and 64(3) of the Constitution of Kenya, that application was fixed for hearing for three consecutive days from 13 June 2005 before a bench of three judges. The Attorney-General, who appears for the first six respondents in the judicial review application, gave a notice to raise a preliminary objection to the judicial review application. By the preliminary objection, the Attorney-General is contesting the jurisdiction of the superior court to grant prerogative orders against the Tribunal and also against the Honourable the Chief Justice. When the judicial review application came for hearing on 13 June 2005, Mr *Mwenesi*, the learned Counsel for the applicant, drew the attention of the superior court to various matters. First, there were affidavits filed by two persons who were not parties to the application and who were not present in court. The applicant sought directions as to whether he could reply to these affidavits as well as serve the deponents with the application. The applicant also sought leave to file further affidavits or further statements to respond to the affidavit of Mr *Gathenji*, learned Counsel for the seventh respondent, regarding the role of the Attorney-General in the Tribunal. Mr *Mwenesi* further applied for adjournment and for leave to file further affidavit and serve the concerned parties. The application for adjournment was opposed by counsel for the respective respondents. By the ruling dated 14 June 2005, the superior court commented on the directions sought by the applicant’s counsel and concluded: “For these same reasons, we allow the applicant to respond there to and do so within ten days (10) from the date of this ruling. Although the applicant fails in all other grounds adduced by Mr *Mwenesi*, we allow the application for adjournment to enable the applicant to respond if necessary, to any new grounds which may have been raised in the affidavits of Stephen ole Ntutu and Sylvester ole Ntutu respectively (*sic*).” The hearing of the preliminary objection was fixed for 21 July 2005. The applicant filed a notice of appeal dated 15 June 2005 indicating his intention to appeal against the decision of 14 June 2005. With that background, the applicant filed the notice of motion in this Court, dated 14 July 2005, under certificate of urgency. By the application the applicant is asking the court to stay further proceedings in the judicial review application, pending the hearing and determination of intended appeal against the ruling of the superior court delivered on 14 June 2005. The certificate of urgency was heard *inter partes* on 26 July 2005 in Mombasa. In the meantime, the Attorney-General was heard in full by the superior court on the preliminary objection to the judicial review application on 21 July 2005. The hearing of the preliminary objection was however adjourned to 28 September 2005 when the applicant’s advocate is expected to reply to the preliminary objection. I have considered the submissions of both counsel. I have also reconsidered both the nature of the ruling of the superior court dated 14 June 2005 and of the application sought to be heard urgently. The applicant, in essence, sought adjournment and leave of the superior court to file further replying affidavits and leave to serve some parties. The superior court allowed the application. The court granted the adjournment sought and leave to file additional affidavits. Indeed, the applicant thereafter filed a 192 paragraph further affidavit sworn on 26 June 2005 pursuant to leave given by the superior court on 14 June 2005. As Mr *Obwayo*, for the first to sixth respondents submitted, the orders that applicant intends to appeal against were largely in the applicant’s favour. Secondly, the orders that the applicant intends to appeal against were procedural and directional in nature. They did not determine any aspect of the pending judicial review application. The superior court did not grant or refuse to grant the orders sought in the judicial review application. By section 8(5) of the Law Reform Act (Chapter 26), there is a right of appeal by a person aggrieved by orders of *certiorari*; prohibition or *mandamus*. Similarly, Order XLII, rule 1(1)(*ee*) of Civil Procedure Rules gives an automatic right of appeal from prerogative orders. The applicant has not, *prima facie,* shown that there is a right of appeal without leave from the orders of the superior court, which are not prerogative orders. Leave of court to appeal has not been obtained. The intended appeal would be incompetent without leave to appeal. Lastly, the directions sought, and the affidavits filed in the superior court related to the substantive application, namely, the judicial review application. They did not affect the preliminary objection to the judicial review application. The preliminary objection is now partly heard. The preliminary objection, if successful, will finally determine the judicial review application. The prosecution of the application pending in this Court will only be necessary if the preliminary objection is not upheld by the superior court. That event has not occurred. For those reasons, I am still of the view that the notice of motion is not urgent. The certificate of urgency is thus dismissed, with costs to the respondents.

For the appellant:

*Mr Mwenesi*

For the first to sixth respondents:

*Mr Obwayo*

For the seventh respondent:

*Mr Gathenji*